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CALIFORNIANS FOR ALTERNATIVES TO TOXICS

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

CALIFORNIANS FOR ALTERNATIVES TO TOXICS

Plaintiff,
vs.

KERNEN CONSTRUCTION CO.,
BEDROCK INVESTMENTS LLC, SCOTT
FARLEY, AND KURT KERNEN.

Defendants.

Case No.

**COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF AND CIVIL
PENALTIES**

(Federal Water Pollution Control Act, 33 U.S.C. §§ 1241-1387)

1 Californians for Alternatives to Toxics (“CAT” or “Plaintiff”), by and through its counsel,
2 hereby alleges:

I. JURISDICTION AND VENUE

4 1. This is a civil suit brought under the citizen suit enforcement provisions of the
5 Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (“Clean Water Act,” “CWA,” or
6 “Act”) against Kernen Construction Co., Bedrock Investments LLC, Scott Farley, and Kurt Kernen
7 (“Defendants”). This Court has subject matter jurisdiction over the parties and the subject matter of
8 this action pursuant to Section 505(a)(1) of the Act, 33 U.S.C. § 1365(a), and 28 U.S.C. § 1331 (an
9 action arising under the laws of the United States). Specifically, this action arises under Section
10 505(a)(1)(A) of the Act, 33 U.S.C. § 1365(a)(1)(A) (citizen suit to enforce effluent standard or
11 limitation). The relief requested is authorized pursuant to 33 U.S.C. § 1365(a) (injunctive relief), 33
12 U.S.C. §§ 1365(a), 1319(d) (civil penalties), and 28 U.S.C. §§ 2201–2202 (power to issue
13 declaratory relief in case of actual controversy and further necessary relief based on such a
14 declaration).

15 2. On or about March 14, 2024, Plaintiff provided written notice to Defendants, via
16 certified mail, of Defendants' violations of the Act ("CWA Notice Letter"), and of its intention to
17 file suit against Defendants, as required by the Act. *See* 33 U.S.C. § 1365(b)(1)(A); 40 C.F.R.
18 § 135.2(a)(1) (1991). Plaintiff mailed a copy of the CWA Notice Letter to the Administrator of the
19 United States Environmental Protection Agency ("EPA"); the Administrator of EPA Region IX; the
20 Executive Director of the State Water Resources Control Board ("State Board"), pursuant to 40
21 C.F.R. § 135.2(a)(1) (1991). A true and correct copy of Plaintiff's CWA Notice Letter is attached
22 hereto as **Exhibit 1**, and is incorporated by reference.

23 3. More than sixty days have passed since Plaintiff served this CWA Notice Letter on
24 Defendants and the agencies. Plaintiff is informed and believes, and thereupon alleges, that neither
25 the EPA nor the State of California has commenced or is diligently prosecuting a court action to
26 redress the violations alleged in this Complaint. This action's claims for civil penalties are not
27 barred by any prior administrative penalty under Section 309(g) of the Act, 33 U.S.C. § 1319(g).

4. Venue is proper in the Northern District of California pursuant to Section 505(c)(1) of the Act, 33 U.S.C. § 1365(c)(1), because the sources of the violations are located within this District. Intra-district venue is proper in San Francisco, California, because the sources of the violations are located within Humboldt County, California.

II. INTRODUCTION

5. This Complaint seeks relief for Defendants' violations of the CWA at the approximately 37-acre facility owned and/or operated by Defendants (the "Facility"). Defendants discharge pollutant-contaminated storm water from the Facility into Noisy Creek and Hall Creek, tributaries of the Mad River, which ultimately flows into the Pacific Ocean (collectively the "Impacted Waters").

6. The Impacted Waters are waters of the United States.

7. Defendants are violating both the substantive and procedural requirements of the CWA.

8. Defendants' discharges of pollutant-contaminated storm water from the Facility violate the Act and the State of California's General Industrial Permit for storm water discharges, State Water Resources Control Board ("State Board") National Pollutant Discharge Elimination System ("NPDES") General Permit No. CAS000001, State Water Resources Control Board Water Quality Order No. 2014-0057-DWQ as amended by Order 2015-0122-DWQ & Order 2018-0028-DWQ ("General Permit" or "Permit").

9. Defendants' violations of the filing, monitoring, reporting, discharge and management practice requirements, and other procedural and substantive requirements of the General Permit and the Act are ongoing and continuous.

10. The failure on the part of industrial facility operators such as Defendants to comply with the General Permit is recognized as a significant cause of the continuing decline in water quality of receiving waters, such as the Impacted Waters. The general consensus among regulatory agencies and water quality specialists is that storm water pollution amounts to more than half the total pollution entering the marine environment each year.

1 11. Hall and Noisy Creeks are both critical spawning and rearing habitat for coho salmon.
2 64 Fed. Reg. at 24,059. The Southern Oregon/Northern California Coast (“SONCC”) coho salmon
3 have been listed as threatened under the federal Endangered Species Act since 1997. 62 Fed. Reg. at
4 24,588.

5 12. The Final Recovery Plan for the SONCC Coho Evolutionary Significant Unit
6 (“ESU”) (“Recovery Plan”) identifies the Mad River population of coho has a high extinction risk.
7 Recovery Plan at 2-35.

8 13. The Recovery Plan identifies sediment as one of the “key limiting stresses” on the
9 Mad River SONCC coho salmon ESU population. Recovery Plan at ES-7. The Recovery Plan also
10 identifies “Impaired Water Quality” as a “Very High” stressor on the Mad River population of coho
11 salmon. *Id.* at 3-6.

12 14. The Mad River Hydrological Unit has been listed as impaired for aluminum pursuant
13 to section 303(d) of the Clean Water Act.

14 15. Analysis of samples taken of Defendants’ discharges to Noisy Creek show extremely
15 high levels of aluminum. In addition, Defendants’ discharges of storm water from the Lower Yard
16 contain high levels of suspended sediment.

17 16. The high levels of suspended sediment in the stormwater discharges from
18 Defendants’ Lower Yard harm these threatened fish by filling in the spaces in the gravel the fish use
19 to spawn, and additionally impair these water bodies’ production of marine insect larvae, an
20 important food source for coho salmon.

21 17. Federal, state and local agencies, in conjunction with private non-governmental
22 organizations, have funded numerous projects in the Impacted Waters to rehabilitate and enhance
23 coho habitat.

24 **III. PARTIES**

25 18. Californians for Alternatives to Toxics is a non-profit public benefit corporation
26 organized under the laws of California.

27 19. Plaintiff’s principal address is 415 I Street, Arcata, California 95521.

1 20. Plaintiff is dedicated to defending the environment against the effects of toxic
2 chemicals, and to preserving and protecting the wildlife and natural resources of California waters,
3 including the waters into which Defendants discharge polluted storm water associated with industrial
4 activities. To further its goals, Plaintiff actively seeks federal and state agency implementation of
5 state and federal water quality laws, including the CWA, and as necessary, directly initiates
6 enforcement actions on behalf of itself and its members.

7 21. Members of CAT, including citizens, taxpayers, property owners, and residents, live,
8 work, travel and recreate on, in, and near Hall Creek, Noisy Creek, and the Mad River, into which
9 Defendants cause pollutants to be discharged. These members use and enjoy the Impacted Waters
10 for cultural, recreational, educational, scientific, conservation, aesthetic and spiritual purposes.
11 Defendants' discharges of storm water containing pollutants impairs each of those uses. Thus, the
12 interests of CAT's members have been, are being, and will continue to be adversely affected by
13 Defendants' failure to comply with the Clean Water Act and the General Permit.

14 22. Members of CAT reside in California and use and enjoy California's numerous rivers
15 for recreation and other activities. Members of CAT use and enjoy the waters of Hall Creek, Noisy
16 Creek, and the Mad River, into which Defendants have caused, are causing, and will continue to
17 cause, pollutants to be discharged. Members of CAT use these areas to fish, boat, kayak, swim, bird
18 watch, view wildlife, and engage in scientific study, including monitoring activities, among other
19 things. Defendants' discharges of pollutants threaten or impair each of those uses or contribute to
20 such threats and impairments.

21 23. The interests of Plaintiff's members have been, are being, and will continue to be
22 adversely affected by Defendants' ongoing failure to comply with the Clean Water Act.

23 24. The relief sought herein will redress the harms to Plaintiff caused by Defendant's
24 activities.

25 25. Defendant Kernen Construction Co. is a general partnership between Defendant Scott
26 Farley and Defendant Kurt Kernen organized under the laws of California.

27 26. Defendant Bedrock Investments, LLC is a limited liability company organized under
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1 the laws of California.

2 27. Plaintiff is informed and believes, and thereupon alleges that Defendants own and/or
3 operate the Facility, and are subject to the terms of the General Permit.

4 28. Defendants are “persons” pursuant to the Act. 33 U.S.C. § 1362(5).

5 29. Continuing commission of the acts and omissions alleged above will irreparably harm
6 Plaintiff and the citizens of the State of California, for which harm they have no plain, speedy or
7 adequate remedy at law.

8 **IV. LEGAL BACKGROUND**

9 **A. Clean Water Act**

10 30. Congress enacted the CWA to “restore and maintain the chemical, physical, and
11 biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). The CWA establishes an “interim
12 goal of water quality which provides for the protection and propagation of fish, shellfish, and
13 wildlife and provides for recreation in and on the water . . .” 33 U.S.C. § 1251(a)(2). To these
14 ends, Congress developed both a water quality-based and technology-based approach to regulating
15 discharges of pollutants from point sources into waters of the United States.

16 31. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of any
17 pollutant from a point source into waters of the United States, unless such discharge is in compliance
18 with various enumerated sections of the Act. Among other things, Section 301(a) prohibits
19 discharges not authorized by, or in violation of, the terms of an NPDES permit issued pursuant to
20 Section 402 of the Act, 33 U.S.C. § 1342.

21 32. The term “discharge of pollutants” means “any addition of any pollutant to navigable
22 waters from any point source.” 33 U.S.C. § 1362(12). Pollutants are defined to include, among
23 other examples, industrial waste, chemical wastes, biological materials, heat, rock, and sand
24 discharged into water. 33 U.S.C. § 1362(6).

25 33. A “point source” is defined as “any discernible, confined and discrete conveyance,
26 including but not limited to any pipe, ditch, channel, tunnel, [or] conduit . . . from which pollutants
27 are or may be discharged.” 33 U.S.C. § 1362(14).

1 34. “Navigable waters” means “the waters of the United States.” 33 U.S.C. § 1362(7).
 2 Waters of the United States includes, among others things, waters that are, were, or are susceptible
 3 to use in interstate commerce, and tributaries to such waters. 40 C.F.R. § 120.2 (Sept. 8, 2023).

4 35. Section 402(p) of the Act establishes a framework for regulating municipal and
 5 industrial storm water discharges under the NPDES program, 33 U.S.C. § 1342(p), and, specifically,
 6 requires an NPDES permit for storm water discharges associated with industrial activity. 33 U.S.C.
 7 § 1342(p)(2)(B).

8 36. Section 505(a)(1) provides for citizen enforcement actions against any “person,”
 9 including individuals, corporations, or partnerships, 33 U.S.C. § 1362(5), for violations of NPDES
 10 permit requirements and for unpermitted discharges of pollutants. 33 U.S.C. § 1365(a)(1)
 11 (authorizing actions against any person alleged to be in violation of an effluent standard or
 12 limitation); 33 U.S.C. § 1365(f) (defining “effluent limitation” broadly to include “a permit or
 13 condition thereof issued under [section 402] of this title,” and “any unlawful act under subsection (a)
 14 of [section 301] of this title”).

15 37. An action for injunctive relief under the Act is authorized by 33 U.S.C. § 1365(a).
 16 Violators of the Act are also subject to an assessment of civil penalties of up to \$66,712 per day for
 17 violations occurring after November 2, 2015, pursuant to Sections 309(d) and 505 of the Act, 33
 18 U.S.C. §§ 1319(d), 1365, and 40 C.F.R. §§ 19.1–19.4.

19 **B. California’s General Industrial Storm Water Permit**

20 38. Section 402 authorizes states with approved NPDES permit programs to regulate
 21 industrial storm water discharges through individual permits issued to dischargers and/or through the
 22 issuance of a single, statewide general permit applicable to all industrial storm water dischargers. 33
 23 U.S.C. § 1342(b).

24 39. Pursuant to Section 402 of the Act, 33 U.S.C. § 1342, the Administrator of EPA has
 25 authorized California’s State Board to issue NPDES permits including general NPDES permits in
 26 California.

27 40. The State Board elected to issue a statewide general permit for industrial discharges.
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1 The State Board issued the General Permit on or about November 19, 1991, modified the General
2 Permit on or about September 17, 1992, and reissued the General Permit on April 17, 1997, and
3 again on April 1, 2014 (effective July 1, 2015), pursuant to Section 402(p) of the Clean Water Act,
4 33 U.S.C. § 1342(p). The General Permit was amended on August 4, 2015, and again on November
5 6, 2018, and the current General Permit, Order WQ 2018-0028-DWQ, became effective July 1,
6 2020.

7 41. Facilities discharging, or having the potential to discharge, storm water associated
8 with industrial activity that have not obtained an individual NPDES permit must apply for coverage
9 under the State's General Permit by filing a Notice of Intent ("NOI"). The General Permit requires
10 facilities to file their NOIs before the initiation of industrial operations.

11 42. Once regulated by an NPDES permit, facilities must strictly comply with all of the
12 terms and conditions of that permit. A violation of the General Permit is a violation of the Act. *See*
13 General Permit, Section XXI.A.

14 43. In order to discharge storm water lawfully in California, industrial dischargers must
15 comply with the terms of the General Permit or have obtained and complied with an individual
16 NPDES permit.

17 44. The General Permit contains three primary and interrelated categories of
18 requirements: 1) discharge prohibitions; 2) Storm Water Pollution Prevention Plan ("SWPPP")
19 requirements; and 3) monitoring and reporting requirements, including the requirement to prepare an
20 annual report.

21 45. Discharge Prohibition III.B of the General Permit prohibits the direct or indirect
22 discharge of materials other than storm water ("non-storm water discharges"), which are not
23 otherwise regulated by an NPDES permit, to the waters of the United States. Discharge Prohibition
24 III.C of the General Permit prohibits storm water discharges and authorized non-storm water
25 discharges that cause or threaten to cause pollution, contamination or nuisance as defined in section
26 13050 of the California Water Code. Receiving Water Limitation VI.A of the General Permit
27 prohibits storm water discharges that cause or contribute to an exceedance of any applicable water
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1 quality standards in any affected receiving water. Receiving Water Limitation VI.B of the General
 2 Permit prohibits storm water discharges to any surface or ground water that adversely impact human
 3 health or the environment.

4 46. Effluent Limitation V.A of the General Permit requires dischargers to reduce or
 5 prevent pollutants in their storm water discharges through implementation of the Best Available
 6 Technology Economically Achievable (“BAT”) for toxic and nonconventional pollutants and the
 7 Best Conventional Pollutant Control Technology (“BCT”) for conventional pollutants.

8 47. The 2008, 2015, and 2021 versions of U.S. EPA’s NPDES Storm Water Multi-Sector
 9 General Permit for Industrial Activities include numeric standards called benchmarks, which are
 10 pollutant concentration values for industrial storm water discharges (“U.S. EPA Benchmarks”). *See*
 11 United States Environmental Protection Agency NPDES Multi-Sector General Permit for Storm
 12 Water Discharges Associated with Industrial Activity, effective September 29, 2008, effective June
 13 4, 2015, and effective September 29, 2021.

14 48. U.S. EPA Benchmarks serve as objective measures for evaluating whether the BMPs
 15 designed and implemented at a permittee facility achieve the statutory BAT/BCT standards. *See* 80
 16 Fed. Reg. 34403, 34405 (June 16, 2015); *see also* 73 Fed. Reg. 56572, 56574 (Sept. 29, 2008); 65
 17 Fed. Reg. 64746, 64766-67 (Oct. 30, 2000).

18 49. The discharge of storm water containing pollutant concentrations exceeding U.S.
 19 EPA Benchmarks evidence a failure to develop and implement pollution control strategies that
 20 achieve BAT/BCT-level pollutant reductions. *See Santa Monica Baykeeper v. Kramer Metals, Inc.*
 21 (*“Kramer”*), 619 F. Supp. 2nd 914, 921-25 (C.D. Cal. 2009); *see also* 80 Fed. Reg. 34403, 34405
 22 (June 16, 2015).

23 50. The following benchmarks have been established, effective September 29, 2021, for
 24 pollutants discharged by Defendants: total suspended solids – 100 mg/L; oil & grease – 15.0 mg/L;
 25 chemical oxygen demand – 120 mg/L; pH – 6.0-9.0 s.u.; zinc – 0.120 mg/L; aluminum – 1.1 mg/L;
 26 lead – 0.082 mg/L; nitrate and nitrite nitrogen – 0.68 mg/L; and, copper – 0.00519 mg/L.

27 51. The California Toxics Rule (“CTR”) is an applicable water quality standard under the
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1 Permit, the violation of which is a violation of Permit conditions. *Cal. Sportfishing Prot. Alliance v.*
 2 *Chico Scrap Metal, Inc.*, 2015 U.S. Dist. LEXIS 108314, *21 (E.D. Cal. 2015).

3 52. CTR establishes numeric receiving water limits for toxics pollutants in California
 4 surface waters. 40 C.F.R. § 131.38. The CTR establishes a numeric limit for at least some of the
 5 pollutants discharged by Defendants: zinc – 0.12 mg/L (maximum concentration); copper – 0.013
 6 mg/L (maximum concentration); and, lead – 0.065 mg/L (maximum concentration).

7 53. The Water Quality Control Plan for the North Coast Region (“Basin Plan”) sets forth
 8 water quality standards and prohibitions applicable to Defendants’ storm water discharges from its
 9 Facility. The Basin Plan includes a narrative toxicity standard which states that “(a)ll waters shall be
 10 maintained free of toxic substances in concentrations that are toxic to, or that produce detrimental
 11 physiological responses in human, plant, animal, or aquatic life.” Basin Plan at 3-6; 4-34.

12 54. The Basin Plan’s Water Quality Standards require a narrower pH range of 6.5 – 8.5
 13 pH units for inland surface waters such as Hall Creek, Noisy Creek, and the Mad River.

14 55. The Basin Plan identifies present and potential beneficial uses for the Mad River,
 15 which include municipal and domestic water supply, hydropower generation, agricultural supply,
 16 industrial service supply, navigation, wildlife habitat, warm freshwater habitat, cold freshwater
 17 habitat, warm and cold spawning, and contact and non-contact water recreation.

18 56. The Basin Plan sets forth water quality objectives to protect these beneficial uses.

19 57. Waters designated for use as domestic or municipal supply shall not contain
 20 concentrations of chemical constituents in excess of the limits specified in California Code of
 21 Regulations, Title 22, Chapter 15. Basin Plan, Section 3.3.3, pp. 3-3, 3-4.

22 58. The primary maximum contaminant level for aluminum is 1.0 mg/L and the
 23 secondary maximum contaminant level for aluminum is 0.2 mg/L.

24 59. Waters that cannot support the identified beneficial uses are designated as “impaired”
 25 by the Water Board. Clean Water Act, section 303(d).

26 60. The Water Board reviews all available water quality data on a waterbody to
 27 determine whether the waterbody should be listed as impaired.

1 61. Due to numerous exceedances of the secondary maximum contaminant level – the
2 applicable water quality objective – the Water Board has identified the Mad River Hydrologic Unit
3 as impaired for aluminum. Final California 2020-2022 Integrated Report (303(d) List).

4 62. Discharges of storm water containing aluminum that exceed the secondary maximum
5 contaminant level of 0.2 mg/L to the Mad River, and its tributaries, therefore cause or contribute to
6 the continued listing of the Mad River HU as impaired for aluminum.

7 63. The General Permit requires dischargers to develop and implement a site-specific
8 SWPPP. General Permit, Section X.A. The SWPPP must include, among other elements: (1) the
9 facility name and contact information; (2) a site map; (3) a list of industrial materials; (4) a
10 description of potential pollution sources; (5) an assessment of potential pollutant sources; (6)
11 minimum BMPs; (7) advanced BMPs, if applicable; (8) a monitoring implementation plan; (9) an
12 annual comprehensive facility compliance evaluation; and (10) the date that the SWPPP was initially
13 prepared and the date of each SWPPP amendment, if applicable.

14 64. Dischargers must revise their SWPPP whenever necessary and certify and submit via
15 the Regional Board's Storm Water Multiple Application and Report Tracking System ("SMARTS")
16 their SWPPP within 30 days whenever the SWPPP contains significant revisions(s); and, certify and
17 submit via SMARTS their SWPPP not more than once every three (3) months in the reporting year
18 for any non-significant revisions. General Permit, Section X.B.

19 65. Dischargers must implement the minimum BMPs identified in Section X.H.1. of the
20 General Permit. In addition to the minimum BMPs identified in Section X.H.1, advanced BMPs
21 must be implemented if necessary to reduce or prevent discharges of pollutants in storm water
22 dischargers in a manner that reflects best industry practice. General Permit, Section X.H.2.

23 66. Special Conditions Section XX.B of the General Permit require a discharger to
24 prepare and submit documentation to the Regional Board upon determination that storm water
25 discharges are in violation of Receiving Water Limitations, Section VI. The documentation must
26 describe changes the discharger will make to its current BMPs in order to prevent or reduce any
27 pollutant in its storm water discharges that is causing or contributing to an exceedance of water
28

1 quality standards. General Permit, Section XX.B.

2 67. Section XV of the General Permit requires an annual evaluation of storm water
3 controls including the preparation of an evaluation report and implementation of any additional
4 measures in the SWPPP to respond to the monitoring results and other inspection activities within 90
5 days of the annual evaluation.

6 68. The General Permit requires dischargers to eliminate all non-storm water discharges
7 to storm water conveyance systems other than those specifically set forth in Section IV of the
8 General Permit unless authorized by another NPDES permit. General Permit, Section III. B.

9 69. The General Permit requires dischargers to implement a Monitoring Implementation
10 Plan. General Permit, Section X.I. As part of their monitoring plan, dischargers must identify all
11 storm water discharge locations. General Permit, Section X.I.2. Dischargers must then conduct
12 monthly visual observations of each drainage area, as well as visual observations during discharge
13 sampling events. General Permit, Section XI.A.1 and 2. Dischargers must also collect and analyze
14 storm water samples from two (2) storm events within the first half of each reporting year (July 1 to
15 December 31) and two (2) storm events during the second half of each reporting year (January 1 to
16 June 3). General Permit, Section XI.B. Section XI.B requires dischargers to sample and analyze
17 during the wet season for basic parameters such as pH, total suspended solids (“TSS”) and oil and
18 grease (“O&G”), certain industry-specific parameters, and any other pollutants likely to be in the
19 storm water discharged from the facility base on the pollutant source assessment. General Permit,
20 Section XI.B.6.

21 70. Dischargers must submit all sampling and analytical results via SMARTS within
22 thirty (30) days of obtaining all results for each sampling event. Section XI.B.11. Sampling results
23 must be compared to the two types of Numeric Action Level (“NAL”) values set forth at Table 2 of
24 the General Permit. General Permit, Section XII. An annual NAL exceedance occurs when the
25 average of the results for a parameter for all samples taken within a reporting year exceeds the
26 annual NAL value. General Permit, Section XII.A.1. An instantaneous NAL exceedance occurs
27 when two (2) or more results from samples taken for any single parameter within a reporting year
28

1 exceed the instantaneous maximum NAL value. General Permit, Section XII.A.2. If a discharger
 2 has an NAL exceedance during a reporting year, the discharger's status changes to Level 1 status
 3 under the General Permit and the discharger must comply with the requirements set forth for Level 1
 4 status operators set forth at Section XII.C. The discharger's status shall change to Level 2 status if
 5 sampling results indicate an NAL exceedance for a parameter while the discharger is in Level 1
 6 status. If a discharger becomes Level 2 status it must comply with the obligations set forth at
 7 Section XII.D of the General Permit.

8 71. Dischargers must submit an Annual Report no later than July 15th following each
 9 reporting year certifying compliance with the Permit and/or an explanation for any non-compliance.
 10 General Permit, Section XVI.

11 **V. STATEMENT OF FACTS**

12 72. On August 8, 2016, Plaintiff filed a First Amended Complaint alleging violations of
 13 the Clean Water Act arising from Defendants' operations at the Facility. That case was styled
 14 *Californians for Alternatives to Toxics v. Kernen Construction Co., Bedrock Investments, LLC, Kurt*
 15 *Kernen, and Scott Farley*, Case No. 4:16-cv-04007-YGR ("2016 Case").

16 73. On September 5, 2017, the Parties entered into a settlement agreement ("2017
 17 Agreement") that resolved the claims brought in the 2016 Case. The 2016 Case alleged violations at
 18 the Facility from August 8, 2011 to November 13, 2017, and the 2017 Agreement resolved only the
 19 violations occurring in that time frame.

20 74. On February 21, 2020, Plaintiff filed a new complaint against Defendants, again
 21 alleging violations of the Clean Water Act arising from Defendants' operation at the Facility. That
 22 case was similarly-styled as the 2016 Case, with a case number of 3:20-cv-01348-YGR-LB ("2020
 23 Case").

24 75. Defendants answered the 2020 Case complaint by admitting the allegations.

25 76. The court entered judgment in favor of Plaintiff, and imposed \$2,087,750 in civil
 26 penalties for 9,461 violations of the Clean Water Act occurring between November 14, 2017 and
 27 May 2, 2021.

1 77. The court issued a permanent injunction against Defendants that expired May 1,
2 2023.

3 78. The court awarded Plaintiff its fees and costs, and Plaintiff subsequently engaged in
4 post-judgment enforcement to collect its award of fees and costs.

5 79. Defendants conduct industrial activities both indoors and outdoors at the
6 approximately 37-acre Facility. Industrial activities at the Facility include, but are not limited to:
7 manufacturing and storing rock aggregate products, storing scrap roofing shingles, storing scrap
8 metal, storing soil and organic debris.

9 80. Most of these activities occur outside in areas that are exposed to storm water and
10 storm flows due to the lack of overhead coverage, functional berms, and other storm water controls.
11 Plaintiff is informed and believes that Defendants' storm water controls, to the extent any exist, fail
12 to achieve BAT and BCT standards.

13 81. The Facility operates under Standard Industrial Classification ("SIC") Codes 5093
14 ("Scrap and Waste Materials") and 1422, 1423, and 1429 ("Crushed and Broken Limestone, Granite,
15 and Stone").

16 82. On August 30, 2018, Defendants submitted a Notice of Information Change to the
17 Regional Board which changed their reported SIC Code from 5093 to 4212 ("Local Trucking
18 Without Storage").

19 83. Defendants submitted a Notice of Intent to comply with the General Permit for the
20 Facility on or about June 8, 2015.

21 84. The Facility is assigned the Waste Discharge Identification Number 1 12I017319.

22 85. Since at least June 8, 2015, the Facility has operated under General Permit coverage.

23 86. The management practices at the Facility are wholly inadequate to prevent the
24 sources of contamination described above from causing the discharge of pollutants to waters of the
25 United States and fail to meet BAT and BCT standards.

26 87. The Facility lacks essential structural controls such as grading, berming and roofing
27 to prevent rainfall and storm water flows from coming into contact with dust, stored soil, crushed
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1 rock and other sources of contaminants, thereby allowing storm water to flow over and across these
2 materials, as well as heavy trucks and construction equipment, and become contaminated prior to
3 leaving the Facility.

4 88. In addition, the Facility lacks structural controls to prevent the discharge of water
5 once contaminated. The Facility also lacks an adequate filtration system to treat water once it is
6 contaminated.

7 89. During rain events, storm water laden with pollutants discharges from the Facility to
8 a small creek, known as Noisy Creek, before discharging to Hall Creek, a tributary to the Mad River,
9 which flows to the Pacific Ocean near McKinleyville, California.

10 90. Information available to Plaintiff indicates that as a result of these practices, storm
11 water containing pollutants harmful to fish, plant and bird life, and human health are being
12 discharged from the Facility directly to these waters during significant rain events.

13 91. Information available to Plaintiff indicates that Defendants have not fulfilled the
14 requirements set forth in the General Permit for discharges from the Facility due to the continued
15 discharge of significantly contaminated storm water.

16 92. On May 21, 2024, the Regional Board issued a Notice of Violation of Water Code
17 Section 13267 Investigative Order R1-2022-0025 and Industrial General Permit Order No. 2014-
18 0057-DWQ for Kernen Construction and Directive to Apply for Water Quality Certification/Waste
19 Discharge Requirements for Activities in Waters of the State pursuant to Water Code section 13260.

20 93. The Regional Board's Notice of Violation alleges that Kernen Construction violated
21 Section III of the General Permit which prohibits industrial storm water discharges and authorized
22 non-storm water discharges containing pollutants that cause or threaten to cause pollution,
23 contamination, or nuisance.

24 94. The Regional Board's Notice of Violation alleges that Kernen Construction violated
25 Section V of the General Permit by failing to implement required minimum BMPs at the Facility,
26 including BMPs to minimize or reduce the discharge of sediment and other pollutants in the
27 Facility's storm water discharges.

1 95. The Regional Board's Notice of Violation alleges that Kernen Construction violated
2 Section X.B of the General Permit by failing to revise the SWPPP and site map since 2022 to reflect
3 current conditions at the site.

4 96. The Regional Board's Notice of Violation alleges that Kernen Construction violated
5 Section X.H.1 of the General Permit by failing to implement minimum BMPs such as good
6 housekeeping, preventative maintenance, spill and leak prevention and response, material handling
7 and waste management, and erosion and sediment control.

8 97. The Regional Board's Notice of Violation alleges that Kernen Construction violated
9 Section XI.B of the General Permit by failing to collect any samples of storm water discharges from
10 the Facility since 2020.

11 98. Defendants' Facility is divided into two separate areas, the Upper Yard and the
12 Lower Yard.

13 99. Industrial activities in the Upper Yard include storage and manufacture of rock
14 aggregate products; crushing and sorting; storage of soil and organic debris; storage of scrap roofing
15 shingles; a truck shop; storage of scrap metals and equipment; and vehicle fueling, maintenance, and
16 cleaning.

17 100. Storm water generated in the Upper Yard generally flows to the south and is collected
18 in a storm water collection system that runs along the southern boundary of the Upper Yard.

19 101. The Facility's February 2022 SWPPP states that if the storm water collection system
20 were to reach capacity, the Upper Yard would discharge storm water from several points along the
21 southern boundary of the Upper Yard.

22 102. Industrial activities in the Lower Yard include equipment storage, and soil stockpiles.

23 103. The Facility's February 2022 SWPPP states that storm water from the Lower Yard is
24 captured in vegetated swales.

25 104. Plaintiff is informed and believes that the Facility discharges storm water associated
26 with industrial activities from additional discharge points not identified by the February 2022
27 SWPPP.

1 105. Storm water associated with industrial activities generated within the Lower Yard
2 discharges into Noisy Creek.

3 106. According to the February 2022 SWPPP, the storm water discharged from the
4 Facility flows to Noisy and Hall Creeks, which are tributaries to the Mad River.

5 107. From the Mad River, storm water carrying pollutants discharged from the Facility
6 flows into the Pacific Ocean.

7 108. Noisy Creek is a water of the United States.

8 109. Hall Creek is a water of the United States.

9 110. The Mad River is a water of the United States.

10 111. The Pacific Ocean is a water of the United States.

11 112. Defendants discharge storm water containing pollutants, including sediment,
12 compounds increasing chemical oxygen demand, aluminum, copper, iron, lead, nitrogen, acetone,
13 pentachlorophenol, and polychlorinated biphenyls from the Facility during every significant rain
14 event.

15 113. Each industrial process undertaken by Defendants at the Facility represents a
16 pollutant source that, pursuant to the General Permit, must be disclosed, assessed, and controlled to
17 prevent or limit pollutant concentrations in storm water discharges. General Permit, § X.G.1-2.

18 114. The Facility's SWPPP has not been revised since February 2022 to reflect current
19 conditions at the Facility.

20 115. The Facility's SWPPP fails to accurately identify each discharge point at the Facility.

21 116. Plaintiff is informed and believes, and thereupon alleges, that Defendants have failed
22 to develop and implement an adequate Storm Water Pollution Prevention Plan at the Facility.

23 117. Defendants' SWPPP does not include a compliant site map, adequate pollutant source
24 descriptions or assessments, adequate BMPs or descriptions of BMPs.

25 118. Defendants have failed to sample storm water discharges from their Facility for
26 approximately four years.

27 119. Defendants have conducted and continues to conduct industrial activities at the
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Facility without developing, implementing, or revising a compliant Monitoring Plan.

120. Defendants have failed to conduct required sampling and analysis of Qualified Storm Events, and has failed to analyze samples collected for all required pollutants at its Facility.

VI. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

**Defendants' Discharges of Contaminated Storm Water from the Facility
in Violation of the General Permit's Effluent Limitations, Receiving Water Limitations, and
Discharge Prohibitions, and the Act
(Violations of 33 U.S.C. §§ 1311(a), 1342, 1365(a), and 1365(f))**

121. Plaintiff incorporates the allegations contained in the above paragraphs as though fully set forth herein.

122. Since at least May 2, 2023, Defendants have discharged storm water polluted with sediment, compounds increasing chemical oxygen demand, aluminum, copper, iron, lead, nitrogen, acetone, pentachlorophenol, and/or polychlorinated biphenyls from the Facility to Hall Creek and Noisy Creek, and into the Mad River, and ultimately the Pacific Ocean,

123. Plaintiff is informed and believes, and thereon alleges, that during every significant rain event, storm water flowing over and through materials at the Facility becomes contaminated with these pollutants, flowing untreated from the Facility into Hall Creek and Noisy Creek, and into the Mad River and Pacific Ocean in violation of the Effluent Limitations in Section V of the General Permit.

124. Aluminum can accumulate on the surfaces of a fish's gill, leading to respiratory dysfunction and possibly death. Sediment harms salmon spawning habitat and, by filling in spaces between gravel on the creek and river beds, reduces the water bodies' productivity of aquatic insect larvae, a principal food source for salmonids.

125. California Fish and Game Code section 5650(a)(6) prohibits the discharge to waters of the state any substances that are harmful to fish. Behavior that is prohibited by law constitutes a public nuisance.

126. Defendants' discharges of industrial storm water containing aluminum in

1 concentrations that exceed water quality standards violates California Fish and Game Code section
2 5650(a)(6).

3 127. Plaintiff is informed and believes, and thereupon alleges, that these discharges of
4 contaminated storm water associated with Defendants' industrial activities are adversely affecting
5 human health and the environment in violation of Receiving Water Limitations VI.A and VI.B of the
6 General Permit.

7 128. Plaintiff is informed and believes, and thereupon alleges, that these discharges of
8 contaminated storm water are contributing to the violation of the applicable water quality standards
9 in the Statewide Water Quality Control Plan, the applicable Regional Board's Basin Plan, and/or the
10 CTR, in violation of Receiving Water Limitation VI.A of the General Permit.

11 129. Defendants' violations of the General Permit's Discharge Prohibitions, Effluent
12 Limitations, and Receiving Water Limitations are ongoing and continuous.

13 130. Each and every violation of any of the General Permit's Discharge Prohibitions,
14 Effluent Limitations, and Receiving Water Limitations is a separate and distinct violation of section
15 301(a) of the Act. 33 U.S.C. § 1311(a).

16 131. Every day, since at least May 2, 2023, that Defendants have discharged polluted
17 storm water from the Facility in violation of the General Permit's Discharge Prohibitions, Effluent
18 Limitations, and Receiving Water Limitations is a separate and distinct violation of section 301(a) of
19 the Act. 33 U.S.C. § 1311(a).

20 132. Defendants are subject to an assessment of civil penalties for each and every violation
21 of the General Permit and Act occurring from May 2, 2023 to the present, pursuant to sections
22 309(d) and 505 of the Act. 33 U.S.C. §§ 1319(d), 1365; 40 C.F.R. § 19.4.

23 133. An action for injunctive relief is authorized by section 505(a) of the Act. 33 U.S.C. §
24 1365(a). Continuing commission of the actions and omissions alleged above would irreparably
25 harm Plaintiff and the residents of the State of California, for which there is no plain, speedy, or
26 adequate remedy at law.

27 134. An action for declaratory relief is authorized by 28 U.S.C. § 2201(a) because an
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actual controversy exists as to the rights and other legal relations of the Parties.

WHEREFORE, Plaintiff prays for judgment against Defendants as set forth hereafter.

SECOND CLAIM FOR RELIEF
**Defendants' Failure to Prepare, Implement, Review, and
Update a Compliant Storm Water Pollution Prevention Plan
(Violations of Permit Conditions and the Act, 33 U.S.C. §§ 1311, 1342)**

135. Plaintiff re-alleges and incorporates all preceding paragraphs as if fully set forth herein.

136. Defendants have failed to develop and implement an adequate SWPPP for its Facility, in violation of General Permit Section X.

137. Defendants continue to be in violation of the Act each day that they fail to develop and fully implement an adequate SWPPP for the Facility.

138. Defendants' violations of the General Permit's SWPPP requirements are ongoing and continuous.

139. Each day since May 2, 2023 that Defendants have failed to develop and implement an adequate SWPPP for the Facility in violation of the General Permit is a separate and distinct violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

140. Defendants have been in violation of the General Permit's SWPPP requirements every day since May 2, 2023. Violations continue each day that an adequate SWPPP for the Facility is not developed and fully implemented.

141. Defendants are subject to an assessment of civil penalties for each and every violation of the General Permit and Act occurring from May 2, 2023 to the present, pursuant to sections 309(d) and 505 of the Act. 33 U.S.C. §§ 1319(d), 1365; 40 C.F.R. § 19.4.

142. An action for injunctive relief is authorized by section 505(a) of the Act. 33 U.S.C. § 1365(a). Continuing commission of the actions and omissions alleged above would irreparably harm Plaintiff and the residents of the State of California, for which there is no plain, speedy, or adequate remedy at law.

^{143.} An action for declaratory relief is authorized by 28 U.S.C. § 2201(a) because an

1 actual controversy exists as to the rights and other legal relations of the Parties.

2 WHEREFORE, Plaintiff prays for judgment against Defendants as set forth hereafter.

THIRD CLAIM FOR RELIEF
**Failure to Develop and Implement the Best Available
And Best Conventional Treatment Technologies at the Facility
(Violations of Permit Conditions and the Act, 33 U.S.C. §§ 1311, 1342)**

6 144. Plaintiff re-alleges and incorporates all preceding paragraphs as if fully set forth
7 herein.

8 145. Defendants have failed, and continue to fail, to reduce or prevent pollutants
9 associated with its industrial activities from being discharged to waters of the United States through
0 the implementation of minimum and advanced BMPs at the Facility that achieve the technology-
1 based BAT/BCT treatment standards.

2 146. Defendants discharge storm water from the Facility containing concentrations of
3 pollutants exceeding the BAT/BCT level of control during every significant rain event.

4 147. Defendants' failure to develop and/or implement BMPs that achieve the pollutant
5 discharge reductions attainable via BAT or BCT at the Facility is a violation of the General Permit's
6 Effluent Limitations and the Act. *See* General Permit, §§ I.D.32, V.A; 33 U.S.C. § 1311(b).

7 148. Defendants violate, and will continue to violate, the General Permit's technology-
8 based pollution control standard each and every time polluted storm water containing concentrations
9 of pollutants exceeding the BAT/BCT level of control are discharged from the Facility.

149. Each and every violation of the General Permit's technology-based effluent
21 limitations is a separate and distinct violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

22 150. Defendants' violations of the General Permit's technology-based effluent limitations
23 and the Act are ongoing and continuous.

24 151. Defendants are subject to an assessment of civil penalties for each and every violation
25 of the General Permit and Act occurring from May 2, 2023 to the present, pursuant to sections
26 309(d) and 505 of the Act. 33 U.S.C. §§ 1319(d), 1365; 40 C.F.R. § 19.4.

²⁷ 152. An action for injunctive relief is authorized by section 505(a) of the Act. 33 U.S.C. §

1365(a). Continuing commission of the actions and omissions alleged above would irreparably harm Plaintiff and the residents of the State of California, for which there is no plain, speedy, or adequate remedy at law.

153. An action for declaratory relief is authorized by 28 U.S.C. § 2201(a) because an actual controversy exists as to the rights and other legal relations of the Parties.

WHEREFORE, Plaintiff prays for judgment against Defendants as set forth hereafter.

FOURTH CLAIM FOR RELIEF

Failure to Implement an Adequate

Failure to Implement an Adequate Monitoring Implementation Plan and to Conduct All Required Monitoring at the Facility (Violations of Permit Conditions and the Act, 33 U.S.C. §§ 1311, 1342)

154. Plaintiff re-alleges and incorporates all preceding paragraphs as if fully set forth herein.

155. Defendants have failed to develop and implement a legally adequate monitoring and reporting program for the Facility.

156. Defendants have failed to collect the required number of samples of storm water discharges from the Facility during each reporting period since at least May 2, 2023, in violation of General Permit Section XI.

157. Defendants have failed to identify and sample a discharge point located in the Lower Yard that discharges storm water associated with industrial materials and activities directly to Noisy Creek, in violation of General Permit Section XI.

158. Defendants' violations of the General Permit's Monitoring Plan and Monitoring requirements and the Act are ongoing and continuous.

159. Defendants are subject to an assessment of civil penalties for each and every violation of the General Permit and Act occurring from May 2, 2023 to the present, pursuant to sections 309(d) and 505 of the Act. 33 U.S.C. §§ 1319(d), 1365; 40 C.F.R. § 19.4.

160. An action for injunctive relief is authorized by section 505(a) of the Act. 33 U.S.C. § 1365(a). Continuing commission of the actions and omissions alleged above would irreparably harm Plaintiff and the residents of the State of California, for which there is no plain, speedy, or

adequate remedy at law.

161. An action for declaratory relief is authorized by 28 U.S.C. § 2201(a) because an actual controversy exists as to the rights and other legal relations of the Parties.

WHEREFORE, Plaintiff prays for judgment against Defendants as set forth hereafter.

FIFTH CLAIM FOR RELIEF

Failure to Complete Required Exceedance Response Actions (Violations of Permit Conditions and the Act, 33 U.S.C. §§ 1311, 1342)

162. Plaintiff incorporates the allegations contained in the above paragraphs as though fully set forth herein.

163. Section XII.A of the General Permit requires dischargers to compare the results of their sampling to the two types of Numeric Action Level (“NAL”) values in Table 2 of the General Permit to determine, for each applicable parameter, whether either type of NAL has been exceeded. If sampling results indicate that an NAL is exceeded, the discharger enters “Level 1 status” for that parameter. General Permit, § XII.C.

164. By October 1 following the commencement of Level 1 status for any parameter, the discharger shall complete an evaluation, with the assistance of a Qualified Industrial Storm Water Practitioner (“QISP”), of the industrial pollutant sources at the facility that are or may be related to the NAL exceedance(s) and identify in the evaluation the corresponding BMPs in the SWPPP and any additional BMPs and SWPPP revisions necessary to prevent future NAL exceedances. General Permit, § XII.C.1.

165. Based on this evaluation, the discharger shall, no later than January 1 following the commencement of Level 1 status, revise the SWPPP as necessary and implement any additional BMPs identified in the evaluation; certify and submit via SMARTS a Level 1 Exceedance Response Action (“ERA”) Report, prepared by a QISP, that includes a summary of the evaluation and a detailed description of the SWPPP revisions and any additional BMPs for each parameter that exceeded an NAL; and, certify and submit via SMARTS the QISP’s identification number, name, and contact information. General Permit, § XII.C.2.

166. On July 1st of each year from 2020 through 2024, Defendants remained at the ERA

1 Level 2 they entered into on July 1, 2018 for total suspended solids, chemical oxygen demand,
 2 aluminum, and iron because they were never able collect four consecutive qualifying storm events
 3 sampled with no exceedances of NALs for each parameter. General Permit, § XII.D.4.

4 167. Despite remaining in ERA Level 2 since 2020, Defendants have not prepared or
 5 submitted via SMARTS the required Level 2 Technical Report in each year.

6 168. Each day of violation of the General Permit is a separate and distinct violation of
 7 Section 301(a) of the Act, 33 U.S.C. § 1311(a). Defendants are subject to civil penalties for each
 8 and every violation of the Act since May 2, 2023. 33 U.S.C. §§ 1319(d), 1365; 40 C.F.R. § 19.4.

9 **VII. RELIEF REQUESTED**

10 Wherefore, Plaintiff respectfully requests that this Court grant the following relief:

11 a. Declare Defendants to have violated and to be in violation of the General Permit
 12 and the Clean Water Act as alleged herein;

13 b. Enjoin Defendants from discharging polluted storm water from the Facility
 14 except as authorized by the General Permit;

15 c. Enjoin Defendants from further violating the substantive and procedural
 16 requirements of the General Permit;

17 d. Order Defendants to immediately implement storm water pollution control
 18 technologies and measures that satisfy BAT and BCT and that prevent pollutants in the Facility's
 19 storm water from contributing to violations of any water quality standards;

20 e. Order Defendants to comply with the General Permit's monitoring and reporting
 21 requirements, including ordering supplemental monitoring to compensate for past monitoring
 22 violations;

23 f. Order Defendants to prepare a SWPPP for its Facility consistent with the General
 24 Permit's requirements and implement procedures to regularly review and update the SWPPP;

25 g. Order Defendants to pay civil penalties of \$66,712 per day per violation for all
 26 violations occurring after November 2, 2015, pursuant to Sections 309(d) and 505(a) of the Act, 33
 27 U.S.C. §§ 1319(d) and 1365(a) and 40 C.F.R. §§ 19.1–19.4;

h. Order Defendants to take appropriate actions to restore the quality of navigable waters impaired or adversely affected by their activities;

i. Award Plaintiff's costs and fees (including reasonable investigative, attorney, witness, compliance oversight and consultant fees) as authorized by the Act, 33 U.S.C. § 1365(d); and,

j. Award any such other and further relief as this Court may deem appropriate.

Dated: July 3, 2024

Respectfully Submitted,

LAW OFFICE OF WILLIAM CARLON

By: /s/ William N. Carlon

William N. Carlon
Attorneys for Plaintiff
CALIFORNIANS FOR
ALTERNATIVES TO TOXICS